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IN THE

# Supreme Court of the United States

October Term, 1956

No. 1141

HOWARD D. ABRAMOWITZ,

*Petitioner,*

v.

WILBUR M. BRUCKER,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Dated, May 27, 1957

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

### Opinions Below

There was no opinion in the District Court. The order granting summary judgment dismissing the complaint is set forth in the Joint Appendix filed in the Court of Appeals at page 22.

The Court of Appeals filed a *per curiam* memorandum, a copy of which is annexed hereto as Appendix A. The judgment of the Court of Appeals is annexed as Appendix B. It held that *Harmon* v. *Brucker*, — F. 2d — (1957), was controlling, with one of the three members of the panel expressing dissent from the *Harmon* case and a second recording reservations about that decision. A writ of

certiorari was granted in the *Harmon* case (October 1956 Term, No. 777) on May 13, 1957. The Court of Appeals opinion in the *Harmon* case will be submitted with this petition.

## Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States and Article I, Section 9 thereof.

The statutes involved are:

a) The Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a:

> "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

b) Section 248 of the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 66 Stat. 481, 495, 50 U. S. C. 991):

> "Subject to the provisions of this chapter, the discharge of commissioned officers of the reserve components shall be effected at the pleasure of the President, and the discharge of other members of the reserve components shall be in accordance with regulations promulgated by the appropriate Secretary."

c) Section 249 of the Armed Forces Reserve Act of 1952 (66 Stat. 481, 495, 50 U. S. C. 992), which reads in relevant portion, as follows:

> "(a) • • •
>
> (b) The President or the appropriate Secretary may drop from the rolls any member of the reserve components who has been absent without authority from his place of duty for a period of three months or more, or who, having been found guilty by the civil authorities of any offense, is finally sentenced to confinement in a Federal or State penitentiary or correctional institution.
>
> (c) A member of a reserve component discharged or separated for cause other than as specified in subsection (b) of this section shall be given a discharge under honorable conditions unless—
>
> (1) a discharge under conditions other than honorable is effected pursuant to the approved sentence of a court-martial or the approved findings of a board of officers convened by competent authority, or
>
> (2) the member consents to a discharge under conditions other than honorable with waiver of court-martial or board proceedings."

The regulation involved is Army Regulation 604-10, set forth, in relevant part, in Appendix C to this petition.

## Statement of the Case

Petitioner is a citizen of the United States and a resident of the State of New York. On October 15, 1951 he was inducted into the Armed Forces pursuant to the Universal Military Training and Service Act of 1951, 50 App. U. S. C. 451 *et seq.* He was released from active service on June 30, 1953, after having seen active service in the Korean conflict (J.A. 2, 12, 13). At that time he

received an honorable separation from active duty and, pursuant to statute (50 App. U. S. C. 454), was transferred to the inactive Reserves (J.A. 2, 3, 13).

On July 15, 1955, petitioner received a communication from the Army stating that information had been received which furnished reason to believe that petitioner's retention in the Army "may not be clearly consistent with the interests of the national security." The "allegations" against appellant were that during 1948 and 1949 he was a member of the Communist Party; that from 1949 to 1951 he was a member of the Labor Youth League; that from 1946 to 1948 he was a member of American Youth for Democracy and that in 1950 he was a subscriber to the "Worker". The Communist Party, the Labor Youth League and American Youth for Democracy were all described as organizations "cited by the Attorney General of the United States" as subversive or as Communist. Petitioner was advised that he could request a hearing, submit a rebuttal in writing, or elect discharge from the Reserves with the understanding that such discharge might be "undesirable" (J.A. 5-7).

Petitioner chose to submit a letter of rebuttal, in which he pointed out that the allegations related exclusively to his pre-induction political activities and asserted that they did not constitute lawful and proper ground to deprive him of his status as a member of the United States Army or to discharge him under conditions other than honorable (J.A. 8-10).

On September 13, 1955, petitioner received an undesirable discharge from the Armed Forces of the United States (J.A. 10). Thereafter he filed successive applications for review of the discharge with the Army Discharge Review Board and the Board for the Correction of Military Records. Both applications were denied (J.A.

3, 11, 21). There are no further administrative remedies available to petitioner.

The regulations under which the Army proceeded initially were SR 600-220-1, superseded by Army Regulation 604-10 a few days after the original letter of allegations. For present purposes the old and new regulations are identical. They set up a series of loyalty criteria for service in the Army, patterned generally after the criteria prescribed for Government civilian personnel in Executive Order 10450, with which this Court is familiar. See *Peters* v. *Hobby*, 349 U. S. 331; *Cole* v. *Young*, 351 U. S. 536. AR 604-10 provides, in Section 19b, that when a discharge is granted pursuant to its terms, it shall be marked "AR 604-10 applies." The undesirable discharge certificate given to the petitioner contains such notation (J.A. 10).

Petitioner prays that the action of the respondent in discharging him from the Army with an undesirable discharge be declared null and void, and that respondent be directed to rescind the undesirable discharge and grant petitioner an honorable discharge.

There being no dispute as to the facts, both parties moved for summary judgment (J.A. 12, 16). The District Court granted summary judgment dismissing the complaint, holding that it had no authority to review the granting of a particular type of discharge (J.A. 22).

The Court of Appeals affirmed in a *per curiam* opinion (Appendix A hereto), feeling itself bound by *Harmon* v. *Brucker*, — F. 2d —. Certiorari has since been granted by this Court in the *Harmon* case.

This case differs from *Harmon* in a number of important respects: 1. Harmon received a general discharge under honorable conditions; petitioner received an undesirable discharge, with a notation that it was given under

the loyalty-security regulations of the Army. The injury to petitioner (see p. 8 ff. below) is therefore considerably more substantial than in *Harmon*. 2. Harmon's discharge was from the active service; petitioner was *honorably* separated from active service, but was discharged, with the certificate complained of, from the Reserves. 3. One of the "allegations" against Harmon, though a minor item, related to his conduct in the service; all of the allegations against petitioner related to pre-induction conduct.

## Questions Presented

1. Does the District Court have jurisdiction to determine the contention of petitioner that his constitutional rights were violated and that the respondent exceeded his statutory powers when he gave petitioner an undesirable discharge from the United States Army Reserves based exclusively on allegations that the petitioner, prior to his induction, had engaged in certain lawful political activity?

2. Does Army Regulation 604-10, as applied to the petitioner, violate his rights under the First and Fifth Amendments to the Constitution and Article 1, Section 9 thereof, in that it purports to authorize the respondent to discharge the petitioner from the United States Army Reserves with an undesirable discharge based exclusively on allegations of the petitioner's lawful political activity engaged in prior to his induction in the Army and prior to the promulgation of AR 604-10 or any predecessor regulation?

3. Is Army Regulation 604-10 authorized by the Armed Forces Reserve Act of 1952 (Act of July 9, 1952, 50 U. S. C. 991, 992) or any other statute?

## Reasons for Granting the Writ

1. The District Court in the instant case held that it lacked "authority to review" the conduct of defendant (J.A. 22). It does not appear that the Court gave any consideration to the constitutional and statutory issues raised by petitioner. The Court of Appeals wrote no opinion in this case, but in the controlling case of *Harmon* v. *Brucker*, — F. 2d —, it did consider the constitutional issues raised. It gave no consideration to the statutory issues, though Judge Bazelon urged that it should (p. 26, slip opinion in *Harmon*, submitted herewith). It then held that "the courts have no authority to take such action [to review a discharge]" (slip opinion, p. 13).

There is a constitutional right to judicial review of the acts of administrative officials who are alleged to have acted in a manner contrary to the Constitution of the United States (*St. Joseph Stockyards* v. *United States*, 298 U. S. 38, 52, 77; *Ng Fung Ho* v. *White*, 259 U. S. 276; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287) or in excess of statutory authority (*Stark* v. *Wickard*, 321 U. S. 288; *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369; *Fleming* v. *Moberly Milk Products Co.*, 160 F. 2d 259).

Constitutional issues aside, petitioner here raises questions as to the statutory authority for the respondent's action. See p. 15 ff. below.

The District Court must have jurisdiction to review the action of the respondent in the present proceeding, unless we are to reach the conclusion, inconsistent with our entire system of government, that the United States Army, unlike all other branches of the executive arm, can act without check by the courts and that the Constitution is unenforceable against it.

No such conclusion is permissible, and the courts have enforced the Constitution against the Army, as against other branches of the government. *Mitchell* v. *Harmony*, 13 How. 115; *Dynes* v. *Hoover*, 20 How. 65; *Burns* v. *Wilson*, 346 U. S. 137; *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664; *Runkle* v. *United States*, 122 U. S. 543; *Shapiro* v. *United States*, 69 F. Supp. 205. The issue here is "wholly dependent upon a question of law." *United States* v. *Williams*, 278 U. S. 255, 257.

The specific issue of the power of a Court to review the type of discharge certificates issued to soldiers was considered but was left open by this Court in *Lamb* v. *Patterson*, 329 U. S. 539, although the Circuit Court of Appeals had, in that case, held that the issuance of a certificate of discharge was subject to judicial review if such conduct was arbitrary. *Lamb* v. *Patterson*, 154 F. 2d 319.

2. In the current political climate, a discharge from the Army marked, in substance, "Discharged under the Military Personnel Security Program" is enough to blight a man's life. Despite this, respondent urges that no injury has been done petitioner and that hence his constitutional rights cannot have been impaired.

This Court has recently noted that an employee excluded from public employment on loyalty charges bears a "badge of infamy." *Wieman* v. *Updegraff*, 344 U. S. 183, 191; *Peters* v. *Hobby*, 349 U. S. 331, 347. The disabilities from which he suffers are many; they have recently been noted by the Court of Appeals for the Second Circuit in *United States* v. *Ullmann*, 221 F. 2d 760, and by Mr. Justice Douglas in footnote 1 to his dissenting opinion in the same case, 350 U. S. 422, 440. We shall not elaborate, but shall

list in a footnote a few of the authorities illustrating the difficulties faced by one who bears such a stigma.[1]

The fact that petitioner has received an honorable separation from active service, and that his undesirable discharge was from the Reserves, does not alter this conclusion. The public infamy noted above applies to him in full force. Moreover, many statutes in New York State, where petitioner resides, limit benefits only to veterans with an honorable discharge from the United States Army and, hence, such benefits would not be available to petitioner.

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[1] PUBLIC EMPLOYMENT:
*Kutcher* v. *Gray*, 91 App. D. C. 266, 199 F. 2d 783; *Kutcher* v. *Higley*, 235 F. 2d 505; *Garner* v. *Board of Public Works*, 341 U. S. 716; *Adler* v. *Board of Education*, 342 U. S. 485.

PRIVATE EMPLOYMENT:
*Parker* v. *Lester*, 227 F. 2d 708, on remand, 141 F. Supp. 519, affirmed, 235 F. 2d 787; *In re Sperry Gyroscope Co.* v. *Engineers Assn.*, 279 App. Div. 630, affd. 304 N. Y. 582; *Fitzgerald* v. *Sperry Gyroscope Co.*, 283 App. Div. 1036; *Loews, Inc.* v. *Cole*, 185 F. 2d 641; *United Electrical, Radio & Machine* v. *General Electric*, 127 F. Supp. 934, affd. 231 F. 2d 259, cert. den. 352 U. S. —.

PASSPORTS:
*Schachtman* v. *Dulles*, 96 App. D. C. 287, 225 F. 2d 938; *Nathan* v. *Dulles*, 129 F. Supp. 951, app. dismissed, 96 App. D. C. 190, 225 F. 2d 29; *Boudin* v. *Dulles*, 136 F. Supp. 218, mod. 235 F. 2d 532.

DOCTORS:
*Barsky* v. *Board of Regents*, 347 U. S. 442.

LAWYERS:
*Konigsberg* v. *State Bar of Calif.*, U. S. S. C., Oct. Term, 1956, No. 5; *In re Anastaplo*, 3 Ill. 2d 471, 121 N. E. 2d 826, cert. den. 348 U. S. 946.

UNITED NATIONS EMPLOYMENT:
Executive Order 10459, 18 F. R. 3183.

Non-judicial comment on the situation is equally impressive. A few of the relevant writings on the subject may be found in: Brown

See § 21 of the Civil Service Law, relating to veteran's preference in Civil Service; § 608 (1) of the Education Law, relating to war service scholarships; §§ 168-176 of the Social Welfare Law relating to many benefits to veterans and members of the families of veterans; § 250 of the Military Law which provides that honorable discharges may be publicly recorded free of charge and § 32 of the General Business Law which provides for the issuance of licenses without payment of the customary license fee, to honorable discharged veterans and their widows.[2]

It is not only the possible loss of statutory benefits which adversely affects petitioner. The Army itself has elsewhere admitted that "nobody can question the fact that the person with the less than honorable discharge has curtailed future opportunity by virtue of that fact." Testi-

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and Fassett, "Security Tests for Maritime Workers", 62 Yale L. J. 1163; Gellhorn, "Security, Loyalty and Science" (1950); Newman, "Control of Information Relating to Atomic Energy", 56 Yale L. J. 769; Brown and Fassett, "Loyalty Tests for Admission to the Bar", 20 Univ. of Chicago Law Review 480; Comment, "Loyalty and Private Employment", 62 Yale L. J. 954; Comment, "Passport Refusals for Political Reasons", 61 Yale L. J. 171; Boudin, "The Constitutional Right to Travel", 56 Columbia Law Review 47; Bonticou, "The Federal Loyalty-Security Program" (1953); Jahoda and Cook, "Security Measures and Freedom of Thought", 61 Yale L. J. 295; Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1; Gellhorn, "Individual Freedom and Governmental Restraints", pp. 40-46, 131 ff. (1956); for an excellent survey of the situation, see Report of the Special Committee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956).

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[2] It is not quite clear whether the federal statute giving Civil Service preference to veterans is limited to those who receive an honorable discharge from the Armed Forces or includes all of those who received an honorable separation from active service. The statute provides that preference shall be given to "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States * * * and have separated therefrom under honorable conditions." (5 U. S. C. 851.)

mony of Jerome D. Fenton, Director of Industrial Personnel Security Review Program, Department of Defense, Nov. 23, 1955, before Sub-committee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 84th Congress, 2d Session, pursuant to S. Res. 94, p. 627. Mr. Fenton went on to say that the consequences of an adverse decision in a security case "are deep" and that he was troubled by them. Hearings, *supra*, p. 628.

AR 604-10 itself provides (§ 21) that when a soldier is given a discharge less than honorable, notice shall be given to the Director of the Federal Bureau of Investigation and the United States Civil Service. Petitioner is a student psychologist; most employment opportunities are likely to be in government service (J.A. 13).

An honorable discharge is a property right. *United States* v. *Keating*, 121 F. Supp. 477. To deprive petitioner of such right, especially with the "loyalty notation" affixed to his undesirable discharge, is dire punishment. The punishment is severe, for it destroys "the reputation of men and their right to work—things more precious than property itself." Mr. Justice Douglas, in *Peters* v. *Hobby*, *supra*, at 351. This grievous injury certainly cannot be inflicted frivolously or for insufficient reasons, or without the protection of our Constitution.

3. The regulation under consideration is invalid because: (a) it is unreasonable and arbitrary and, hence, in violation of the requirements of substantive due process under the Fifth Amendment to the Constitution; (b) it purports to give to the Army the authority to impose sanctions upon members of the Armed Forces for their lawful conduct as civilians and is, hence, in violation of the Fifth Amendment to the Constitution. Because the conduct in question related to the exercise of freedom of speech and association, it also violates the First Amendment; (c) it further violates the due process clause of the Constitution

as well as Article 1, Section 9, in that it operates retroactively so that alleged activities of petitioner, subject to no penalty at the time they took place, are made subject to a penalty by a regulation subsequently adopted; and (d) it is unconstitutionally vague.

a) The Army seeks to justify its conduct by arguing the need to maintain security in the Armed Forces. For present purposes, we assume that the Army has an absolute right to discharge any member of the Armed Forces for any reason which, in its unrestricted judgment, seems to be necessary for its best interests.[3]

But here the Army did not merely discharge petitioner. It attached to his discharge a badge of infamy, the consequences of which have already been described. The security of the Army is completely protected by granting discharges based on the character of service rendered. The granting of an undesirable discharge based upon the Army's evaluation of a soldier's pre-induction conduct is quite unrelated to any purpose the Army may have.

The familiar test of the substantive due process adequacy of an administrative regulation is: does the means chosen for the accomplishment of a generically permitted object bear a real and substantial relation to the accomplishment of the permitted object, or does it unreasonably interfere with personal rights? *Railroad Retirement Board* v. *Alton*, 295 U. S. 330; *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79. Under this test the regulation, as applied here, is unreasonable in the substantive due process sense, for the end sought, namely, preservation of the

[3] We make this assumption for purposes of this case, and only because petitioner is not here suing for his right to be retained as a member of the Reserves if the respondent does not wish him to remain. As an original proposition, we might doubt whether the right of the Army, in a democratic society, can be as absolute as we have assumed.

security of the Armed Forces, cannot justify the injury inflicted on petitioner. The instant case involves personal rights and, hence, is entitled to extraordinary protection. *U. S.* v. *C. I. O.*, 335 U. S. 106, 141 (Rutledge, J., concurring); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Thomas* v. *Collins*, 323 U. S. 516, 530.

b) The Army has on recent occasions unsuccessfully sought to try a civilian for offenses committed during prior military service. *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11. On a more famous occasion, it unsuccessfully sought to try a civilian for offenses committed in the course of a war. *Ex Parte Milligan*, 4 Wall. 2. The Navy has unsuccessfully sought to try a man in service for a crime committed during a previous term of service, an honorable discharge having intervened. *United States ex rel. Hirschberg* v. *Cooke*, 336 U. S. 210. But never before, so far as we know, has the military attempted to try a member of the Armed Forces for conduct prior to induction. Cf. *Kinsella* v. *Krueger*, 351 U. S. 470 and *Reid* v. *Covert*, 351 U. S. 487, reargument on both ordered November 5, 1956, 25 Law Week 3136.

Respondent denies that the discharge was given for pre-induction activities; rather, he says, it was given because petitioner was a security risk, the evidence thereof being his pre-induction activities. This is a mere play on words. Petitioner gave concrete demonstration of his loyalty and devotion by serving honorably under fire in Korea. The fact is that he is being punished for pre-induction conduct.

Serious question arises as to whether any governmental agency may impose penalties on anyone on the basis of the charges here alleged. *Wieman* v. *Updegraff*, 344 U. S. 183. Cf. *Schneiderman* v. *U. S.*, 320 U. S. 118. And see *Schware* v. *Board of Law Examiners*, October Term 1956, No. 92 and *Koenigsberg* v. *State Bar of California*, October Term 1956, No. 5, both decided May 6, 1957. Certainly no

such authority can be vested in the Army under the circumstances shown here. In *United States ex rel. Toth* v. *Quarles, supra*, this Court considered a situation which was, in part, a mirror-image of that presented here. There the Army sought to try a civilian for criminal conduct committed during service in the Army. Here the Army seeks to try a soldier for conduct (not even claimed to be criminal) committed prior to induction. The Army has no more jurisdiction over the offense in this case than it had over the person of the petitioner in the *Toth* case.

Further, the nature of the "allegations" here makes it clear that vital First Amendment issues are implicit in this record. The Army here is passing judgment on the basis of pre-induction political activity. The dangers to our constitutional structure raised by such a claim of power by the military are serious and quite unprecedented in our history.

c) Fair play "is the essence of due process." *Galvan* v. *Press*, 347 U. S. 522, 530. The regulation and its application to petitioner offend the most fundamental concepts of fair play. It imposes punishment retroactively for activities lawful at the time they were engaged in.

AR 604-10 was promulgated on June 29, 1955. Its predecessor regulation, SR 600-220-1, was promulgated on June 18, 1954. The conduct charged against the petitioner dates back to 1946.

Even if this regulation is otherwise valid it is an unconstitutional bill of attainder as applied to petitioner. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

d) The regulation in many respects is unconstitutionally vague and, particularly, the criteria for determining whether an individual is a "security risk" (AR 604-10, Sec. 13b) do not even approach the standards required of constitutionally valid legislation.

Subdivisions (4), (7), (8), (9) and, by reference, (10), (11) and (12) of Sec. 13b all make use of the term "subversive" as a key word. The letter of allegations served upon appellant likewise makes constant use of that term. It is not defined by the regulation. It cannot imply advocacy of the overthrow of the United States Government by force or other illegal means (*Adler* v. *Board of Education*, 342 U. S. 485) since subdivisions (1), (2), (3) and (4) of Sec. 13b refer to such action. See the dissenting opinions in *U. S.* v. *Josephson*, 165 F. 2d 82, 94 and *Barsky* v. *U. S.*, 167 F. 2d 241, 260. In neither case did the majority pass on this issue.

Equally indefinite terms are scattered through the regulation. See Sec. 13b, subdivisions (2), (4) and (10) ("sympathetic association"), subdivision (8) ("infiltrated by members of subversive groups"), and elsewhere.

Finally, the basic standard applied by AR 604-10—"inconsistent with the interest of national security" (Sec. 1, 3, 12, et al.)—is inherently vague. It provides substantially no objective criterion on the basis of which a judgment can be made.

The regulations hence fail to meet this Court's standards with respect to the certainty required if due process is to be afforded. See *Connally* v. *General Construction Co.*, 269 U. S. 385; *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233; *Lanzetta* v. *N. J.*, 306 U. S. 451; *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *U. S.* v. *C. I. O.*, 335 U. S. 106.

4. Respondent claims that statutory authority for AR 604-10 and its predecessor SR 600-220-1 is to be found in the Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. 991 and 992, set forth at pp. 2, 3, *supra*. The statute does not refer to the power of respondent to issue a discharge from the Reserves on the basis of charges of preinduction conduct.

The purpose of the Act of 1952 is set forth in the Senate Report on the Bill as follows:

> "The primary purpose of this bill is to bring together, to the greatest extent practicable, in one statute the great number of laws relating to the reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, which have been enacted during past decades."
>
> • • •
>
> "The second purpose of this bill is to enact, on a basis which is applicable to all of the Armed Forces uniformly, certain new provisions of law which have been shown to be necessary to correct existing defects in policies or practices relating to the Reserve and the individual members thereof.
>
> The impact of these new provisions of law will not be particularly significant because, with few exceptions, they merely enact into law policies which are now being carried out administratively." Senate Report No. 1795, United States Code Congressional and Administrative News, 82nd Congress, 2nd Session, p. 2005."

The report then goes on to summarize the "new provisions of law." The section under consideration was not listed. Evidently, therefore, Congress considered Section 992 to be merely a reenactment of the law then in effect.

Never since the establishment of the Republic has the Army sought to discharge anyone on the basis of charges of disapproved pre-induction conduct. To the extent to which non-exercise of a power may cast grave doubt on its existence, we have here almost two centuries of such non-exercise. " • • • [T]he want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, 352. See also, *Mintz* v. *Baldwin*, 289 U. S. 346, 351; *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46, 51.

There is here much more than mere non-exercise of a power; both the Army and the courts have long understood that the character of a discharge was intended only to reflect the character of Army service.

This Court, in *United States* v. *Kelly*, 15 Wall. 34, approved the opinion of the Judge Advocate General of the United States Army in holding that a discharge certificate "* * * was a formal final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it * * *."

The Attorney General has likewise recognized this to be the character of a discharge. Almost 100 years ago he said:

> "* * * Regularly, an officer or soldier, upon his discharge from service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible: * * *." 13 Op. Atty. Gen., 16, 18 (1869).

The Army itself has ruled that the character of service during a previous enlistment may not be considered in determining the nature of a discharge. In 1918 the Judge Advocate General of the Army said:

> "A soldier, who was dishonorably discharged in a previous enlistment, was inducted into the service during the late emergency and served honestly and faithfully. Under such circumstances he was entitled to an honorable discharge at the end of his present service. A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." Dig. Op., J. A. G. (1912-1930). Section 271, p. 128; Nov. 30, 1918.

Even absent constitutional questions, we should argue that only very specific language could create the very broad power here asserted. The fact that the asserted power by the respondent would raise difficult constitutional questions is even further reason for refusing to give to the statute quoted the scope claimed by the respondent.

5. The issue presented here is an important one and should be decided by this Court. It raises issues as to the authority of a civil court to pass upon the action of the military. Critical constitutional issues involving both First and Fifth Amendments are involved. And, most important, the future lives of several hundreds [4] of young men, many of whom served with honor and distinction in the Korean conflict, are at stake. They are entitled to the judgment of this Court on a matter so vital.

As is noted above (p. 5), there are factual differences between this case and *Harmon* which we feel justify the granting of a writ in this case. For purposes of present discussion, the principal difference between the two cases lies in the respective nature of the discharges granted to the two petitioners. Harmon received a general discharge without any notation that such discharge was pursuant to the Army security regulations. In opposing the writ, the principal argument by the respondent in the *Harmon* case was that, in fact, Harmon suffered no injury.

In the instant case the petitioner received an undesirable discharge with the "security risk" notation. The principal defense available to the respondent in the *Har-*

[4] In addition to *Harmon*, there are, or have been, perhaps a dozen other cases, raising similar issues, in various district courts. We would estimate that there are many scores of cases which have completed the administrative hearings within the Defense Department, or are still involved in those proceedings, in which no litigation was commenced. And, beyond doubt, there are many, many more who have not been able to undertake the expense and trouble of the extensive administrative processes involved.

*mon* case is therefore not available to the respondent in this case. Furthermore, the present case is much more typical of the several hundred similar cases affecting an equal number of young men, many of whom served with honor and distinction in the Korean conflict.

As an additional reason for granting a writ in this case it might be noted that Harmon and the petitioner are represented by different counsel and there is a considerable difference in the treatment of the issues in the two cases, as indicated by the petitions in the two cases. We feel, therefore, that the granting of a writ in this case will result in the most complete and satisfactory presentation of the issues to the Court.

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Dated, May 27, 1957

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
*Attorneys for Petitioner,*
25 Broad Street,
New York 4, N. Y.

## Appendix A

### UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13587

HOWARD D. ABRAMOWITZ, APPELLANT

v.

WILBER M. BRUCKER, Secretary of the Department of the Army, APPELLEE

---

Appeal from the United States District Court for the District of Columbia

---

Decided April 26, 1957

*Mr. Victor Rabinowitz*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court with whom *Mr. David Rein* was on the brief, for appellant.

*Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, *Paul A. Sweeney*, *Donald B. MacGuineas* and *Howard E. Shapiro*, Attorneys, Department of Justice, submitted on the brief for appellee.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

PER CURIAM: We are agreed that *Harmon* v. *Brucker*, — U. S. App. D. C. —, — F. 2d — (1957), is controlling here. If the question were open, Judge Bazelon would reverse for the reasons stated in his dissent in *Harmon* and Judge Fahy would wish to consider the question anew.

*Affirmed.*

## Appendix B

**(Judgment)**

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,587—April Term, 1957

HOWARD D. ABRAMOWITZ,

Appellant,

v.

WILBER M. BRUCKER, Secretary of the Department of the Army,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

C. A. 2140—56
Filed April 26, 1957

Before:

BAZELON, FAHY and DANAHER,
*Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel for appellant and submitted on the brief for appellee.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: April 26, 1957.

PER CURIAM.

# Appendix C

## ARMY REGULATION 604-10

### Personnel Security Clearance.

### Military Personnel Security Program

## SECTION I

### General

1. Purpose and scope. a. Purpose. These regulations prescribe the standard, criteria, and administrative procedures for the reporting, investigation, and disposition of military personnel in the Army Establishment; for the rejection of applicants for appointment or enlistment; and for the rejection of persons who would otherwise be inducted or involuntarily ordered into the Army when retention in or acceptance into the Army is inconsistent with the interests of national security. These regulations do not preclude trial by court-martial when such action is considered appropriate by commanders exercising court-martial jurisdiction. They do not preclude relief from active duty or discharge under other applicable regulations on grounds *other* than security. These regulations should not be used in those cases in which security is not the primary reason for initiation of action. Relief from active duty in lieu of action under these regulations is not authorized nor will action under these regulations be used as the *sole* basis for relief from active duty prior to the adjudication of a member's case.

b. Scope. These regulations apply to all military members of the Army Establishment including members of the National Guard of the United States on active duty and not on active duty and special categories of personnel covered in section VI. The Chief, National Guard Bureau will issue

appropriate implementing instructions governing the National Guard of the United States not on active duty.

* * *

3. Policy. a. The Department of the Army will assume, in the absence of evidence to the contrary, that the acceptance or retention of any officer, warrant officer, or enlisted man is clearly consistent with the interests of national security.

b. When it is established that retention of a member is *not clearly consistent* with the interests of national security, he will be discharged; except that an inductee normally will not be discharged as a security risk unless his retention is *inconsistent* with the interests of national security. (The standard for retention in service of an inductee is of necessity somewhat lower than the standard for other categories of personnel. Thus an inductee may be retained to perform his obligated service in a specially controlled duty under conditions which would require discharge of an officer or an enlistee. Also see par. 17b). In deciding upon the characterization of discharge in such cases, any doubt will be resolved in favor of the member and he will be discharged under honorable conditions. He will, unless otherwise prescribed in these regulations, be discharged with a discharge characterized no higher than "General, under Honorable Conditions."

* * *

## SECTION II

### Standard and Criteria

12. Standard. The standard for appointment, enlistment, voluntary call to active duty, or retention in a regular duty status within the Army Establishment will be that, based upon all the available information, it is determined that the appointment, enlistment, voluntary call to active duty, or retention in a regular duty status (par. 9) is

*clearly consistent* with the interests of national security. The standard for retention within the Army Establishment on definite assignment to specially controlled duties (par. 10) for inductees only will be that retention in such an assignment is *not inconsistent* with the interests of national security.

13. Criteria for application of standard. a. *Sensitive and non-sensitive positions.* * * *

b. *Criteria.* The ultimate determination of whether acceptance or retention within the Army Establishment of the person concerned is warranted must be an overall common-sense one based upon all available information. The activities and associations listed below, whether current or past, while not all inclusive, are of varying degrees of seriousness, and warrant initiation of action to effect such determination.

(1) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with or aiding or abetting another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(2) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with any espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the Government of the United States or the alteration of the form of the Government of the United States by unconstitutional means.

(3) Advocacy of use of force or violence to overthrow the Government of the United States, or of the alteration of the form of the Government of the United States by unconstitutional means.

(4) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of Government of the United States by unconstitutional means (see SR 600-220-11). (An organization, movement, or group, officially designated by The Attorney General of the United States pursuant to Executive Order 10450, shall be presumed to be subversive until the contrary has been established.)

(5) Performing or attempting to perform his duties, or otherwise acting, to serve the interests of another government in preference to the interests of the United States.

(6) Failure or refusal to sign the loyalty certificate DD Form 98; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, in refusing to answer completely the questions contained in DD Form 98, DD Form 390, DD Form 398, or other related forms; pleading protection of the Fifth Amendment or of the Uniform Code of Military Justice, Article 31, or otherwise failing or refusing to answer any pertinent question propounded in the course of an official investigation, interrogation, or examination, conducted for the purpose of ascertaining the existence or extent, or both, of conduct of the nature described above and below.

(7) Participation in the activities of an organization as a front for an organization referred to

in (4) above, when his personal views were sympathetic to the subversive purpose of such organization.

(8) Participation in the activities of an organization with knowledge that it had been infiltrated by members of subversive groups under circumstances indicating that the individual was a part of, or sympathetic to, the infiltrating element or sympathetic to its purpose.

(9) Participation in the activities of an organization referred to in (4) above, in a capacity where he should reasonably have had knowledge of the subversive aims or purposes of the organization.

(10) Sympathetic association with a member or members of any organization referred to in (4) above. (Ordinarily, this will not include chance or occasional meetings, or contacts limited to normal business or official relations.)

(11) Currently maintaining a close continuing association with a person who has engaged in activities or associations of the type referred to above. A close continuing association may be considered to exist if the individual lives at the same premises as, frequently visits, or frequently communicates with, such persons.

(12) Close continuing association of the type described in (11) above, even though later separated by distance, if the circumstances indicate that renewal of the association is probable.

(13) Any facts other than as set forth in c below which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security. Among matters which should be considered in this category would be the presence of a spouse, parent, brother, sister,

or offspring in a nation, a satellite thereof, or an occupied area thereof, whose interests are inimical to the interests of the United States.

* * *

d. *Proscibed organizations.* A list of organizations designated by The Attorney General is set forth in SR 600-220-11. Membership, past or present, or affiliation or sympathetic association with an organization so designated is but one factor to be considered in making a determination in a particular case. In determining whether affiliation with a cited organization warrants further investigation, all facts bearing on the case must be considered including the date, term, and extent of affiliation, the age and circumstances of the individual at the time, the type of organization and its status at the time in question, and the military service and overall performance of duty of the individual concerned. Careful consideration of all these factors, particularly in the absence of any other derogatory information, may indicate that the initiation of a complaint type investigation is not warranted.

## SECTION III

### Administrative Procedures

* * *

d. No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

* * *

19. Type of discharge. a. Where the approved findings of the Army Review Board indicate that a member of the Army Establishment should not be retained under the standards and criteria prescribed in these regulations he will be discharged and the character of the discharge will, except as prescribed in paragraph 17, be predicated upon the gravity of the reasonably substantiated information in derogation. The general premise with respect to characterization of separation as set forth in paragraph 17b is applicable to all categories of personnel (par. 3b). Regular Army officers with over 3 years' service as such will be furnished a discharge authorized by section 106, Army and Air Force Vitalization and Retirement Act of 1948 (61 Stat. 1082; 10 U. S. C. 585).

b. The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: "AR 604-10 SPN 83." The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: "AR 604-10 applies." Members relieved from active duty or discharged prior to completion of an action under these regulations will have "Paragraphs 9 and 20 (as appropriate), AR 615-120 applies" entered in item 38, DD Form 214.

* * *

21. Notification to other agencies. In accordance with SR 615-180-1, the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the appropriate local Selective Service Board will be furnished information of the identity of all persons rejected for induction for security reasons. The Assistant Chief of Staff, G-2, Department of the Army, will inform the Director, Federal Bureau of Investigation, the Chairman of the United States Civil Service Commission, and the Director, Selective Service System, of all persons denied appointment or enlistment or discharged from the military service as security risks.

* * *

## SECTION V

### Disposition of Cases

29. General. a. Upon receipt of a case with appropriate recommendation from the Assistant Chief of Staff, G-2, Department of the Army, The Adjutant General will—

* * *

(2) Refer all other cases to a Department of the Army Screening Board for review and recommendations.

* * *

31. Follow-up of Screening Board recommendations.

* * *

b. *Action to continue the case.* When the Screening Board recommends action other than to close the case, The Adjutant General will notify the appropriate staff activity and/or field command of action desired. If elimination action or indefinite assignment to specially controlled duties is recommended under these regulations, The Adjutant General will initiate action as indicated in c below.

c. *Letter of Allegations.* Upon receipt of a Screening Board recommendation to initiate elimination action or to indefinitely assign the member to specially controlled duties, The Adjutant General, based on information furnished by the Assistant Chief of Staff, G-2, Department of the Army, will, in conjunction with the Judge Advocate General, prepare a "Letter of Allegations." The "Letter of Allegations" will cite the derogatory allegations against the respondent in sufficient detail to enable him to prepare his defense and will be as complete as security considerations permit. The case together with the "Letter of Allegations" will be transmitted to the appropriate field command for dispatch of the letter to the respondent. Whenever practicable, the field commander will have the letter delivered in person to the respondent concerned and obtain receipt therefor. If personal delivery is not practicable

delivery will be by registered mail and a return receipt "addressee only" will be required. The following additional procedure will apply with respect to members of the National Guard not on active duty: The "Letter of Allegations" will be forwarded direct to the respondent by the Chief, National Guard Bureau (par. 6 applies); the Chief, National Guard Bureau, will forward a copy of the "Letter of Allegations" to the major commander concerned citing the date of dispatch to the respondent; the respondent will acknowledge receipt of the "Letter of Allegations" to the major commander concerned and will make his reply to the major commander concerned; The Adjutant General will forward the case direct to the major commander concerned. The "Letter of Allegations" will refer specifically to these regulations and will inform the respondent that—

(1) He may, in lieu of appearance before a board, rebut the letter in writing within 15 days of receipt and submit such documents as he may desire. Reasonable extension of time may be granted by the field commander.

(2) He may, within 5 days of receipt, request retirement, if eligible, or if an officer, he may tender his resignation, or if an enlisted man, he may request discharge in lieu of further proceedings. Enlisted men who are required to show cause why they should not be retained on specially controlled duties will not be permitted to submit a request for discharge. A member tendering his resignation or requesting discharge must agree to accept discharge of the character specified in the "Letter of Allegations." Final decision as to type of discharge to be awarded rests with the Department of the Army. A form letter to accomplish the tender or request will accompany each "Letter of Allegations" dispatched.

(3) He may, within 5 days of receipt, request a personal appearance hearing before a "field board"

with or without counsel, and if a reservist not on active duty, such appearance will be at his own expense. He will be furnished a military counsel and may select such counsel, if the individual selected is reasonably available. Civilian counsel, if desired, will be at his own expense. The Board will assist him in procuring witnesses who are reasonably available but he will not be entitled to reimbursement for expenses incurred incident to their appearance.

(4) He will elect in writing one of the choices offered in (1), (2), or (3) above. Should he refuse to elect one of the choices offered, he will be advised that his case will be processed to completion and adjudicated by the Department of the Army without any further referral to him. He will be advised also that such adjudication may result in an other than Honorable, General, or Undesirable Discharge.

d. *Follow-up of letter of allegations.* Upon receipt of the respondent's reply to the "Letter of Allegations" or upon expiration of 15 days following receipt of the letter by the respondent, whichever is sooner, the appropriate field commander will take action to refer the case to a field board of inquiry (if requested by the respondent) or to forward the case together with respondent's reply, if any (where appearance before a board of inquiry is not requested), to The Adjutant General with recommendation of action to be taken. The Adjutant General will refer the complete case together with recommendations of appropriate field commanders to the Army Review Board for final review in accordance with paragraph 33.

* * * *

33. Department of the Army Review Board. a. Upon receipt of a case with recommendations of the field board of inquiry and appropriate field commanders together with additional comments, if any, from the respondent, or upon

the expiration of 10 days plus normal mailing time to and from the respondent following his receipt of transcript of the "Field Board" actions, whichever is later, The Adjutant General will refer the case to the Army Review Board for final review and recommendation.

* * *

e. The Review Board will direct one of the actions indicated in paragraph 32c (7), to include the type of discharge when appropriate, except that when the Review Board decision is to discharge a Reserve officer on active duty or a Regular Army officer with less than 3 years' service as such, the Board will submit the case to the Secretary of the Army for final approval.

f. The decisions of the Review Board, and where applicable, of the Secretary of the Army, will be transmitted to The Adjutant General for necessary action.

* * *

35. Action following final review. The Adjutant General will notify the appropriate field commander of final action to be taken. In cases concerning members of the National Guard not on active duty, the Chief, National Guard Bureau, will be informed of such action.

* * *

c. If retention of the member is not warranted under the standards and criteria prescribed by these regulations The Adjutant General will direct the discharge of the member from any and all military statuses he may hold, including type of discharge to be furnished. Flagging action will be removed by the Department of the Army in accordance with AR 600-31.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13230

JOHN H. HARMON, III, APPELLANT

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, APPELLEE

---

Appeal from the United States District Court for the District of Columbia

---

Decided January 31, 1957

*Mr. David I. Shapiro,* of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, with whom *Mr. James H. Heller* was on the brief, for appellant.

*Mr. Donald B. MacGuineas,* Attorney, Department of Justice, with whom Assistant Attorney General *George Cochran Doub, Mr. Oliver Gasch,* United States Attorney, and *Messrs. Samuel D. Slade* and *Howard E. Shapiro,* Attorneys, Department of Justice, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and DANAHER, Circuit Judges.

PRETTYMAN, *Circuit Judge:* John Henry Harmon, III, was inducted into the Army on October 31, 1952, under

the Universal Military Training and Service Act of 1948.[1] In May, 1953, some questions concerning membership in and relations with the Communist Party, and similar matters, were addressed to him by Army officials. He replied under oath, answering some questions and refusing to answer others on the ground of possible self-incrimination; his answers were reduced to writing and signed by him. In February, 1954, he was notified by the Adjutant General of the Army that he should reply to certain derogatory information which had been received concerning him. This derogatory information was itemized in seven specifications, "a" to "g". Items "a" through "d" and Item "g" concerned reported activities on Harmon's part, Item "e" activity on his father's part, and Item "f" activities on his stepmother's part. Harmon replied to the items concerning himself, but as to Items "e" and "f" he said: "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor stepmother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand." Thereafter Harmon was informed that his discharge as disloyal or subversive under Army Regulation 615-370 had not been favorably considered and that he would be retained in the service in his then-present grade. Shortly thereafter the Secretary of Defense issued Directive 5210.9, the purpose of which was to apply to military personnel the security programs established by Executive Order 10450 in respect to civilian Government employees. It directed that the standard for retention within the armed services should be "that on all the available information it is determined that the * * * retention is clearly consistent with the interests of national security."

---

[1] 62 STAT. 604, 50 U.S.C.A. App. § 451 *et seq.*

The directive was accompanied by a memorandum from the Secretary, directing that a review be made of all cases which had theretofore been cleared. Thereupon Harmon's case was reviewed, and the Army Personnel Board found that his further retention in the service was inconsistent with the interests of national security and recommended that he be discharged with an undesirable discharge. On June 2, 1954, he was discharged as undesirable. Harmon appealed to the Army Discharge Review Board to have the character of his discharge changed from undesirable to honorable. He was given a hearing, at which he appeared, and thereafter his application for a change was denied. He applied to the Army Board for the Correction of Military Records for the change in his discharge, and that application was denied. He then made a direct request to the Secretary for award of an honorable discharge, and this request was reviewed by an Assistant Secretary, who referred it to the Board for the Correction of Military Records. Harmon declined a hearing before that Board, stating that he had no additional facts to present. He took the position that the discharge certificate must accurately and adequately reflect the character of his military service and that, inasmuch as the character of this service, as set forth in his service record, was "excellent", he should receive an honorable discharge. The Board recommended against a change in the discharge, and the Assistant Secretary approved that recommendation.

Harmon filed a complaint in the District Court, praying that the action of the Secretary in discharging him with an undesirable discharge be declared null, void and illegal as in violation of the Constitution, the statutes, and Army regulations; and that his discharge be ordered changed from undesirable to honorable. On February 3, 1956, the District Court granted the Secretary's motion for summary judgment, on the ground that the court lacked authority to review, control or compel the granting of

particular types of discharge certificates to persons discharged from the Army.[2] Harmon appealed. Thereafter the Army Discharge Review Board, in the course of a general review of military personnel security cases, reviewed Harmon's case, and the character of his discharge was changed from undesirable to general under honorable conditions. He was thereupon issued a discharge certificate reading:

GENERAL DISCHARGE

Under Honorable Conditions
from the Armed Forces of the United States of America

This is to certify that
John Henry Harmon III US51 207 184 Private AUS
was Discharged from the

ARMY OF THE UNITED STATES
on the 2d day of June 1954 under honorable conditions

[Signed] R L Richstatter
R L RICHSTATTER
*Captain Adjutant General's Corps*

The Secretary suggested to this court that the case thus became moot. Harmon opposed the suggestion, upon the ground that the controversy was whether he should receive an honorable discharge. This court, on August 17, 1956, by order denied the Secretary's suggestion of mootness.

The alleged derogatory information concerning Harmon which was incorporated in Items "a", "b" and "c" of the initial notice of the Adjutant General concerned activities in 1951 and 1952 in a camp reported to be Communist-operated, employment in 1949 in an organization reported to be subversive, and registration in 1952 with the American Labor Party, cited by the House Committee as being

[2] Harmon v. Brucker, 137 F.Supp. 475 (1956).

under Communist control. All these alleged activities were prior to Harmon's induction into the Army. Item "d" was that Harmon "Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act." Within a month after his induction into the Army Harmon wrote a letter to two friends, suggesting that they make a financial contribution to assist in the defense of two individuals who had been indicted under the Smith Act. Item "g" was that Harmon had been "Associated with persons who were Communists or Communist sympathizers." In response to this item Harmon said he was not then nor had he ever been a member of the Communist Party but that in the course of appearances before many groups and audiences it was quite possible that he had known or been acquainted with Communists or their sympathizers.

In respect to Harmon's military service the Secretary says that his (Harmon's) service record was marked "excellent" for the periods November 12, 1952, to July 24, 1953, and from August 2, 1953, to April 24, 1954, and that for the balance of his service his record was marked "unknown" as to character and efficiency.

As the case is now before us, the questions are (1) whether the court can declare null and void the action of the Secretary in discharging Harmon with a "General Discharge Under Honorable Conditions" and (2) whether the court can order the Secretary to change Harmon's discharge from "General Discharge Under Honorable Conditions" to "Honorable Discharge". We agree with the District Judge that the court cannot take either of such actions.

The nub of Harmon's contention on the first question is that he is entitled to judicial review of the Army's action. He does not contend that he could not be discharged; his complaint goes to the type of discharge given him. He was accorded all the procedural steps established by the Army regulations for the consideration and

determination of the propriety of discharges from the military service. As we have pointed out, he specifically told the Army authorities that he had no further facts to present. No statute was misapplied in the process or the substance of the discharge. No statute directs or authorizes judicial review of Army discharges. Indeed the statute provides that decisions of the Army boards shall be final.[3] Thus Harmon's argument must rest upon constitutional grounds: that as a matter of due process of law or by some other constitutional requirement he was entitled to court review of the type of discharge which he should be given.

The Constitution provides that the President shall be Commander in Chief of the Army and Navy of the United States[4] and that Congress shall have power to make rules for the government and regulation of the land and naval forces.[5] Title 10 of the United States Code clearly expresses a Congressional intent that the Army be administered solely by the executive branch of the Government.[6] The statute in effect at the time of Harmon's discharge provided[7] that "No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, *except in the manner prescribed by the Secretary of the Department of the Army*, or by sentence of a general or special

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[3] Act of June 22, 1944, 58 STAT. 286, as amended, 38 U.S.C.A. § 693h.

[4] Art. II, § 2, cl. 1.

[5] Art. I, § 8, cl. 14.

[6] 10 U.S.C. § 3012 (1956) [formerly 5 U.S.C.A. § 181—4, 64 STAT. 264 (1950).

[7] 41 STAT. 809 (1920), as amended, 10 U.S.C.A. § 652a (Supp. 1956) [now 10 U.S.C. § 3811 (1956)].

court-martial." (Emphasis ours.) Throughout our history the Articles of War and similar statutes have entrusted to the Secretary of War and his agents the granting of certificates of discharge.[8] The statute which authorized the Secretary to establish a board to review the types and natures of discharges specifically provided that the findings of such a board should be "final subject only to review by the Secretary of the Army".[9] The courts have held many times that they have no power to review the administrative processes by which the President and the Secretaries administer the affairs of the Army, and this doctrine has extended to the nature of discharges from the service.[10] On this subject we said in *Gentila* v.

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[8] WINTHROP, MILITARY LAW AND PRECEDENTS 547, 931, 933, 961, 972 (2d ed. 1920); Act of April 2, 1806, 2 STAT. 359, 361; REV. STAT. § 1342, Art. 4 (2d ed. 1878); Sec. 4(b), Selective Service Act of 1948, 62 STAT. 606, as amended, 50 U.S.C.A. App. § 454(b).

[9] *Supra* note 3.

[10] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301-302, 10 L.Ed. 968 (1842); Reaves v. Ainsworth, 219 U.S. 296, 304, 306, 55 L.Ed. 225, 31 S.Ct. 230 (1911), *affirming* 28 App. D.C. 157 (D.C.Cir. 1906); Creary v. Weeks, 259 U.S. 336, 66 L.Ed. 973, 42 S.Ct. 509 (1922); French v. Weeks, 259 U.S. 336, 66 L.Ed. 965, 42 S.Ct. 505 (1922); Reid v. United States, 161 Fed. 469 (S.D.N.Y. 1908), *writ of error dismissed*, 211 U.S. 529, 53 L.Ed. 313, 29 S.Ct. 171 (1909); Davis v. Woodring, 72 App. D.C. 83, 111 F.2d 523 (D.C.Cir. 1940); Schustack v. Herren, 234 F.2d 134 (2d Cir. 1956); Nelson v. Peckham, 210 F.2d 574 (4th Cir. 1954); Bernstein v. Herren, 136 F.Supp. 493 (S.D.N.Y. 1955), 141 F.Supp. 78 (S.D.N.Y. 1956), *aff'd*, 234 F.2d 434 (2d Cir. 1956); Weeks v. United States, 51 App. D.C. 195, 277 Fed. 594 (D.C.Cir. 1922), *aff'd sub nom.* Creary v. Weeks, 259 U.S. 336, 66 L.Ed. 973, 42 S.Ct. 509 (1922); Marshall v. Wyman, 132 F.Supp. 169 (N.D.Cal. 1955); Nordmann v. Woodring, 28 F.Supp. 573 (W.D.Okla. 1939); McKenzie v. Kirkpatrick, 141 F.Supp. 49 (N.D.Cal. 1956).

*Pace:* [11]

> "We think Congress intended that the Board's [the Army Discharge Review Board's] full and 'final' review should not be subjected to a further review, or series of reviews, in the courts. We may suppose that Congress considered the heavy burden that would be imposed upon courts if they were required to review the findings upon which Army discharges are based. As the Supreme Court has said in regard to a type of dispute for which the Railway Labor Act provides, the 'intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.' Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 305, 64 S. Ct. 95, 99, 88 L. Ed. 61."

It is said that the foregoing statement was *dictum*. Whether that be so or not, we think the statement is correct. We adhere to it and adopt it for application here.

The import of the opinion of the Supreme Court in *Orloff* v. *Willoughby* [12] is the same as that of the opinions we have cited. There a physician inducted into the Army under the Doctors Draft Act [13] refused to state whether he was a member of the Communist Party. Because of this refusal he was not commissioned or given the duties of an Army doctor. He applied to a federal court for *habeas corpus* and for a discharge. He urged that it had been a uniform practice to commission Army doctors and, furthermore, that his induction under the Doctors Draft Act contemplated and required that he be given a commission. The Supreme Court held that the courts have no power to review such a matter, which fell within the

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[11] 90 U.S. App. D.C. 75, 77, 193 F.2d 924, 927 (1951), *cert. denied*, 342 U.S. 943, 96 L.Ed. 702, 72 S.Ct. 556 (1952).

[12] 345 U.S. 83, 97 L.Ed. 842, 73 S.Ct. 534 (1953).

[13] 64 STAT. 826 (1950), 50 U.S.C.A. App. § 454(i).

executive duties of the President and the Army. The Court observed:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service." [14]

Reason and the practicalities dictate the rule which we have found in the cases. Reason, flowing from the doctrine of the separation of powers, dictates that in many fields the administrative discretion of the executive branch and the legislative discretion of the legislative branch be not subject to interference or review by the courts. In no field is this doctrine more pertinent and important than in the operation of the armed forces. Provisions for the establishment and operation of such forces necessary to the security of this country are wholly legislative matters, and the administration of those forces is the very essence of executive action. The Constitution so provides. Only in the most extreme cases can the judiciary interfere in this area. As a practicality the operation of military forces requires expeditious, sometimes instant,

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[14] 345 U.S. at 93-94.

action and thus requires discipline. From the standpoint of the Army it is easy to see the disastrous effect upon discipline if the type of discharge which could be given an enlisted man were not within the power of his commanding officer or the Secretary, but were subject to litigation and to review and decision by a court wholly removed from the necessities of military affairs. As a further matter of practicality, from the standpoint of the courts review of such matters would impose an appalling burden, with which the courts are wholly unequipped to cope.

Harmon's insistence is that the type of discharge given him must be determined by the character of his military service and without regard to pre-induction events, activities, etc. But that is not our question. Our question is not what type of discharge he ought to be given; it is whether a court can review and determine the type of discharge. Harmon says a court can and must do so. To reach that conclusion a number of propositions are suggested.

The first such proposition concerns procedural due process. Harmon was given an opportunity to reply to the alleged derogatory information and was then issued a discharge. Thereafter he was given a hearing before the Army Discharge Review Board. He appealed that Board's adverse decision to the Army Board for the Correction of Military Records, again without success. Later, in connection with a direct appeal to the Secretary, he was offered a second hearing, which he declined. Harmon was thus given the full measure of procedural rights afforded by the Congress for persons in the military service. The Supreme Court held in *Reaves* v *Ainsworth*,[15] "Besides, what is due process of law must be determined by

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[15] 219 U.S. 296, 304, 55 L.Ed. 225, 31 S.Ct. 230 (1911). And see Burns v. Wilson, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

circumstances. To those in the military or naval service of the United States the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts."

Harmon urges that the Army violated Directive 5210.9 by failing to give him a hearing. He was notified on May 26, 1954, of his proposed discharge. The Directive provides "an opportunity upon request to present any cause why he should not be so separated." Harmon made no such request. Later, as we have pointed out, he was afforded a hearing before the Review Board. The requirements of procedural due process were fully met.

We find no question of substantive due process. The consideration of pre-induction activity was not frivolous, arbitrary or discriminatory; it was based upon reasonable grounds. Activity in the Communist movement involves participation in a conspiracy dangerous to our national security. Surely the Army cannot be compelled to retain a security risk in its service. Surely the President may apply to military personnel the same program and policies as to security and loyalty which he applies to civilian personnel in sensitive positions in the Government civilian service.[16] Harmon does not contend that he could not be separated from the service because of pre-induction conduct. If that be so, if he can be discharged as a security risk, the Army can determine whether he is or is not a security risk. And in that determination surely no data is more relevant and material than are his past habits, activities and associations. Such data is universally the material from which a determination of character or suitability is made, if indeed it is not the only material

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[16] See Cole v. Young, 351 U.S. 536, 100 L.Ed. 1396, 76 S.Ct. 861 (1956); *cf.* Jason v. Summerfield, 94 U.S. App. D.C. 197, 214 F.2d 273 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 840, 99 L.Ed. 662, 75 S.Ct. 48 (1954).

from which it can be made. The Army, in making that determination, was not trying to find him guilty or not guilty of some act or offense. It was trying to determine his character as a security risk *vel non* and his consequent suitability for Army service. If it could make that determination, as admittedly it could, and upon that basis could determine whether a man was suitable for any service whatsoever, it could include that consideration among the factors to be considered in determining the value of his service and, consequently, in selecting the type of discharge to be given him. Moreover it is reasonable for Army authorities to believe that a security risk is not usable for many types of military service required of other soldiers, and that factor may well affect the value of the military service of such a person and, consequently, the type of discharge given him.

An honorable discharge from the Army is, as Harmon claims it is, a mark of distinction. The courts cannot dictate to the Army that it must give this mark to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security.

It is suggested that a general discharge under honorable conditions imposes a "stigma" and so is punishment. Punishment, it is said, cannot be inflicted without judicial scrutiny. The Army can impose punishment, even the punishment of death, without judicial review.[17] Moreover the type of a discharge is not punishment in the sense that judicial process is required. No finding of guilt, no loss of liberty are involved. The penalty is the same as that which results from many unhappy experiences. Consideration of such "penalties" must begin in perspective. A discharge from civilian, commercial employment carries penalties in a real sense—stigma, loss of pay, dif-

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[17] Burns v. Wilson, 346 U.S. 137, 97 L.Ed. 1508, 73 S.Ct. 1045 (1953).

ficulty in subsequent employment; but no one would suggest that an employer cannot discharge an employee without judicial scrutiny. A civilian employee of the Government can be dismissed upon charges of a criminal offense without judicial review.[18] The courts do not interfere in such matters. When the same "penalties" arise from action of military authorities, they do not thereby become "punishment" necessitating judicial action.

Stigma attaches on rejection from military service as a security risk. Indeed, if one be rejected entirely, on account of being a security risk, the adverse effects are greater than upon receiving a General Discharge Under Honorable Conditions. Many benefits attach to status under the latter which do not attach to rejection. And the intangibles of stigma attach in either event. Nevertheless it certainly cannot be urged that the Army may not reject, without judicial review, as a security risk one registered for service.

It is suggested that an honorable discharge is of so great value that a man can be denied one only if he be afforded a right to judicial review. To hold to that effect would be to vitiate the whole discharge process provided by the Secretary.[19] The courts have no authority to take such action. They cannot arrogate to themselves supervisory authority over the Army. Apt on this point is another quotation from *Reaves* v. *Ainsworth*, *supra*. The Supreme Court said:

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[18] See, *e.g.*, Eberlein v. United States, 257 U.S. 82, 42 S.Ct. 12, 66 L.Ed. 140 (1921).

[19] On March 18, 1954, Robert T. Stevens, then Secretary of Defense, told the Senate Armed Services Committee: "When the evidence fails to show that he is disloyal, or is subversive, but does establish that he is otherwise a security risk and should be eliminated, he is separated under honorable conditions, usually with a general discharge." *Hearings on S. 3096*, 83d Cong., 2d Sess. 75.

> "The courts have no power to review. The courts are not the only instrumentalities of government. They cannot command or regulate the army. To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. • • • If it had been the intention of Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined."[20]

There is a margin of value of an "Honorable Discharge" over a "General Discharge Under Honorable Conditions". But a considerable measure of value is involved in a Government job, such as was involved in *Williams* v. *Cravens*,[21] and in the rights of a contractor, such as were involved in *Larson* v. *Domestic & Foreign Corp.*,[22] and in a public utility business, such as was involved in *Kansas City Power & Light Company* v. *McKay*.[23] Yet in all these instances the holders of the rights were deprived of them without court review.

It is suggested that the consideration of pre-induction happenings is in conflict with the traditional policies of the Army. Most certainly we cannot order the Army to

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[20] 219 U.S. at 306.

[21] 93 U.S. App. D.C. 380, 210 F.2d 874 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 819, 99 L.Ed. 646, 75 S.Ct. 30 (1954).

[22] 337 U.S. 682, 93 L.Ed. 1628, 69 S.Ct. 1457 (1949).

[23] 96 U.S. App. D.C. 273, 225 F.2d 924 (D.C.Cir. 1955), *cert. denied*, 350 U.S. 884, 100 L.Ed. 780, 76 S.Ct. 137 (1955).

adhere to traditional practices. The armed forces in 1953-54 faced many new problems not involved in the operation of the military services of the 1770's, or the 1860's, or in 1917-18, or even in the early 1940's. Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country. The efforts of this movement to infiltrate all parts of the Government pose new problems, which must be met with new rules and regulations.

Harmon argues that the pre-induction events considered by the Army were political opinions and so could not validly be considered under the First Amendment. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain in its service a security risk.

We come now to the second of Harmon's prayers, that the court direct the issuance to him of an honorable discharge. It is settled beyond question that the courts will not direct by *mandamus* any executive action which lies within the realm of executive discretion.[24] This is a rule of law quite apart from the peculiar insulation of Army affairs from judicial scrutiny. Harmon's prayer that the court direct the issuance to him of an honorable discharge is certainly a prayer for *mandamus*, and certainly the Congress has lodged within the area of executive discretion the selection of types of discharges to be given military personnel. So this prayer in Harmon's complaint does not lie within the jurisdiction of the court under the general rule applicable to all types of executive action. Even if such a prayer for mandatory direction ran

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[24] Anderson v. McKay, 94 U.S. App. D.C. 11, 211 F.2d 798 (D.C.Cir. 1954), *cert. denied*, 348 U.S. 836, 99 L.Ed. 660, 75 S.Ct. 51 (1954). See discussion and cases cited in Clackamas County, Ore. v. McKay, 94 U.S.App. D.C. 108, 219 F.2d 479 (D.C.Cir. 1954).

only to a civilian matter which had none of the elements of a military affair, the courts would have no authority in respect to it.

*Affirmed.*

BAZELON, *Circuit Judge*, dissenting: Appellant is a youth who was plucked out of civilian life and made a soldier, as are many others, at the threshold of the career he was planning for himself. Before the end of his term of service, he was restored to his civilian status, but hung about his neck was the millstone of "security risk." The Army has information about his civilian activities and associations on the basis of which it believes it would not be in the national interest to retain him as a soldier, but his military service is admitted to have been "excellent" and he is not claimed to have done anything illegal or reprehensible during his tour of duty. He does not challenge the discretion of the Secretary of the Army to judge whether the national security is served by dismissing a soldier. He complains only that, in the exercise of that discretion, there is neither necessity nor authority for inflicting upon him a gratuitous wound which may plague him all the rest of his days.

Appellant was inducted into the Army on October 31, 1952, as a draftee. On February 9, 1954, the Adjutant General of the Army informed him that the Army had received "derogatory" information about him and ordered him to reply thereto. He replied in writing on March 11, 1954. On April 2, 1954, the Adjutant General of the Army, acting by order of appellee, informed appellant that, upon review of the derogatory information and appellant's replies thereto, it had been determined that appellant would not be discharged under AR 615-370 as disloyal or subversive, but would be retained in his grade until completion of his service period, at which time he would receive a discharge "appropriate to the character

of service" he had rendered.[1] Five days later, the Secretary of Defense promulgated his Directive 5210.9, purporting to apply to military personnel the criteria of the civilian security program, Executive Order 10450 (April 27, 1953, 18 FED. REG. 2489), and to authorize dismissal of a soldier as a security risk if "on all the available information it is determined that [his] retention is [not] clearly consistent with the interests of national security." On May 26, 1954, the determination to let appellant complete his service was reversed and he was informed that he would be given an "undesirable" discharge under AR 615-370 prior to the expiration of his service period. On June 2, 1954, he received such a discharge.[2]

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[1] This comported with the traditional Army policy that the type of discharge be governed entirely by the service record, absent some disqualification covered by specific regulation. Thus, though a less than honorable discharge certificate can be given to a homosexual, a drug addict, a chronic alcoholic, a habitual shirker, a person with psychopathic personality, or a repeated petty offender (AR 635-208, formerly AR 615-368); to a deserter, a soldier who has entered the Army by fraud, or one who is convicted of crime in a civil court (AR 635-206, formerly AR 615-366); or to one who is "determined by investigation to be disloyal or subversive" (AR 615-370, as implemented by Special Regs. 600-220-1); where there is no such fault, an honorable discharge is called for if the soldier's conduct has been rated at not less than "good" and his efficiency at not less than "fair" (AR 635-200, par. 8). Former Secretary of the Army Stevens told a Senate Committee:

> The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest during the time in the service would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service. *Hearings, Senate Armed Services Committee on S. 3096*, 83d Cong., 2d Sess., March 18, 1954, at p. 75.

[2] Defense Directive 5210.9 provides that the separation re-

Appellant sought unsuccessfully to have his discharge changed to "honorable," first by appeal to the Army Discharge Review Board and then, in turn, to the Army Board of Correction of Military Records and the Secretary of the Army. Having exhausted all possible administrative remedies, he commenced this suit seeking a declaration that his undesirable discharge was void and an order that it be changed to an honorable discharge. Cross-motions for summary judgment were made. The District Court, concluding that it lacked jurisdiction of the cause, denied appellant's motion and entered summary judgment against him. This appeal followed.

The derogatory information the Army had about appellant was that he had been employed at what was "reported to be a Communist operated camp"; that he had been employed by the Detroit Urban League, "reported

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port of a soldier discharged as a security risk "will cite as authority the appropriate Armed Service directive under which separation is effected." Par. VIII-F-6. On June 2, 1954, when appellant was given his undesirable discharge, there was no specific Army directive dealing with security risks. AR 615-370, which was cited in the separation report as authority for the discharge, permits an undesirable discharge only upon a determination that the soldier is "disloyal or subversive." No such determination having been made regarding appellant, AR 615-370 was inapplicable. Indeed, appellee asserts that it was cited by mistake, the real basis for appellant's discharge being Directive 5210.9 itself.

By the time the Army Discharge Review Board reviewed appellant's discharge on April 11, 1956, and upgraded it to "General," the Army had already promulgated its specific "Personnel Security Clearance" regulations, AR 604-10, July 29, 1955. But those new regulations were not cited in the corrected separation report as authority for the action. The only additional authority cited for the new action was "Sec. 301, P.L. 346" which is merely the provision for review procedure. 58 STAT. 286 (1944), 38 U.S.C. § 693(h). Thus the only basis for appellant's discharge remains Defense Directive 5210.9.

to be a subversive organization"; that he had once "registered to vote in New York City with the American Labor Party . . . cited by the House Committee on Un-American Activities as being under Communist control . . ."; that he had solicited contributions for the defense of Smith Act prosecution defendants; that his father was reported to be a Communist and connected with various organizations cited as subversive by the Attorney General and to have registered many times with the American Labor Party; that his step-mother had registered with the American Labor Party for about ten years; and that he associated with Communists or Communist sympathizers.[3] In his written reply of March 11, 1954, appellant admitted summer employment by the camp as a kitchen-helper and assistant breakfast cook and by the Urban League as a counselor in its camp for under-privileged negro children. Concerning registration with the American Labor Party,

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[3] On May 7, 1953, the Army, without revealing this derogatory information to appellant, used it as the basis for interrogating him. On that occasion appellant denied that he was or had ever been a Communist or a member of any subversive organization, gave some details concerning persons about whom he was asked, described the circumstances under which he solicited funds for the defense of the Smith Act defendants, and gave sundry other information. With respect to a number of questions, appellant invoked his privilege under the Fifth Amendment and under Article 31 of the Uniform Code of Military Justice, 64 STAT. 118, 50 U.S.C. § 602, against self-incrimination. He later explained that he had invoked his privilege as a result of fear and apprehension growing out of the circumstances of the interrogation and the fact that he was without counsel. The questions as to which he had invoked the privilege were put to him again in the February 9, 1954, order and he answered all of them, except those relating to his parents. As to those, his refusal was based not on privilege, but rather on "moral indignity [*sic*]," "filial piety," and the assertion that they were irrelevant.

he had admitted it when first interrogated in May 1953,[4] and now added only that, since it was a legally recognized political party, he felt he could properly vote for it. Similarly, he had earlier admitted soliciting funds for the defense of two Smith Act indictees, and now merely added that he felt he had a right to do so. He denied that he was or had ever been a member of the Communist Party, but said that it was possible that he had known or been acquainted with Communists or sympathizers. The allegations concerning his parents he refused to reply to, as he had at his earlier interrogation. The District Court noted in its opinion that "Save for plaintiff's continuing association with his parents and for writing one letter requesting contribution for the legal defense of two persons indicted under the Smith Act, all charges against plaintiff were based on conduct antedating his induction into the Army."[5]

In his complaint, appellant alleged that his character and efficiency ratings had been "excellent." In his first answer, filed July 19, 1955, appellee admitted this allegation. On November 29, 1955, however, by amended answer, he pointed out that for about a week in July 1953 and for the period after April 24, 1954 (shortly before his discharge was ordered) appellant's rating was recorded as "unknown." But, under Army regulations, "ratings of 'unknown' and ratings for periods of less than two months are not 'disqualifying.'"[6]

Appellant also alleged that he was not and had never been a member of the Communist Party, or any Communist organization, or any organization advocating overthrow of the government or advocating or approving violence in denying others constitutional rights, or any or-

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[4] *Supra* note 3.

[5] *Harmon* v. *Brucker*, 137 F.Supp. 475, 476 (D.D.C. 1956).

[6] AR 615-360, par. 8b.

ganization seeking to alter our form of government by unconstitutional means, or any organization which, so far as he knew, had ever engaged in subversive activities. He also alleged that he was and always had been "completely and unswervingly loyal to the Government of the United States" and that he "would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever." Appellee denied these allegations, not on the ground that he believed them to be untrue but because of "lack of knowledge and information sufficient to form a belief" concerning them.

Appellee's first contention is that we should not even reach the question whether the District Court correctly declined jurisdiction. He informs us that, after this appeal was filed, the Adjutant General notified appellant that the character of his discharge had been upgraded from "undesirable" to "General (under honorable conditions)" and he asserts that there is, therefore, no longer a judicially cognizable case or controversy.[7] This new form of discharge, however, is not the legal equivalent of the honorable discharge which appellant sought.

It may well be, as appellee states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a "general" discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where appellant resides, and those statutes all use the language "honorable discharge" or "honorably discharged." Although the New York courts have not decided whether this excludes holders of a discharge entitled "General (under honorable conditions)," the late Judge Frank of the Court of Ap-

[7] The majority expresses no specific opinion as to this contention. It would seem, however, since the majority proceeds to deal with the question of the District Court's jurisdiction, that it rejected the contention that there is no longer a judicially cognizable case or controversy.

peals for the Second Circuit suggested that it would.[8] But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than "honorable."[9] This is, of course, confirmed by the statement of appellee's counsel in oral argument that "every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable."

Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security considerations. The same observation could be made concerning the "undesirable" discharge. In both instances, however, a person

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[8] "Although a General Discharge (Under Honorable Conditions) apparently entitles a veteran to most, if not all, benefits under federal law, the statutes of New York, of which plaintiff is a resident, requires [*sic*] that a veteran have an Honorable Discharge in order to be eligible for various benefits under state law. See e.g. New York Military Law Sections 245, 250; New York General Municipal Law Section 148; New York Education Law Section 609; New York General Business Law Section 32." *Schustack* v. *Herren*, 234 F.2d 134, 135 n.2 (2d Cir. 1956).

[9] What the Supreme Court said in *Wieman* v. *Updegraff*, 344 U.S. 183, 190-91 (1952), concerning the discharge of an employee on disloyalty grounds is, we think, not inapplicable here:

> There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when "each man begins to eye his neighbor as a possible enemy."

sufficiently interested to check army regulations would discover the "security" character of the discharge. In the case of the "undesirable" discharge, the only reference to security was the citation of the "disloyal or subversive" regulation, AR 615-370, as the "Reason and Authority for Separation." The separation report accompanying the "General" discharge recited that "Para. 10, AR 615-120 applies." This regulation was cited, according to appellee, "to inform recruiting officers that appellant is ineligible for enlistment in the Regular Army." [10] As anyone may discover, this is a reference to AR 604-10, paragraph 15d, which provides:

> No applicant will be appointed or enlisted without the specific approval of the Secretary of the Army if his separation from previous service indicates that he was relieved from active duty or discharged either as a security risk or for reasons other than security while undergoing investigation under the provisions of these regulations or of corresponding security regulations issued by the other military departments. AR 615-120 applies with respect to former members of the armed services seeking enlistment or reenlistment in the Army.

See also Defense Department Directive 5210.9, par. II.

Our jurisdiction to entertain the appeal being unimpaired, the next question to consider is the District Court's ruling that, under our decision in *Gentila* v. *Pace*, 90 U.S.App.D.C. 75, 193 F.2d 924 (1951), it was "constrained" to disclaim jurisdiction of the cause.

"Stripped of self-contradiction and legal conclusions

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[10] Compare, in this connection, *Bailey* v. *Richardson*, 86 U.S.App.D.C. 248, 257-58, 182 F.2d 46, 55-56 (1950), *affirmed by an equally divided Court*, 341 U.S. 918 (1951), in which in sustaining the validity of the Government's civilian employee loyalty program, we pointed out that "mere dismissal from the Government service" is not punishment in the sense that permanent proscription from Government service had been held to be in *United States* v. *Lovett*, 328 U.S. 303, 316 (1946).

all that [Gentila's] complaint allege[d]" was that his dishonorable discharge for desertion rested upon "an erroneous finding of fact" that he was mentally capable of forming an intent to desert. We held that "merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court." 90 U.S.App.D.C. at 77, 193 F.2d at 927. Although the District Court recognized that the instant case involved questions of law, it nevertheless thought *Gentila* controlling on the ground that both cases also involve "a review of the findings upon which the separation was based . . . ." *Harmon* v. *Brucker*, 137 F.Supp. 475, 477 (D.D.C. 1956). In this the District Court was wrong. The "findings upon which the separation [in the present case] was based" are not challenged at all. Indeed, as the majority opinion points out, appellant does not challenge the appellee's power to remove him from the Army on mere suspicion that he is a security risk.[11] But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, appellant claims that those interests are not served by branding such a soldier as a security risk as he passes through the gate.[12] The issue he raises is one

[11] Cf. *Bailey* v. *Richardson*, *supra* note 10, 86 U.S.App.D.C. at 263, 182 F.2d at 61: "The Constitution does not require the President to continue to use in the training of Government personnel, the work performed by this appellant, a person whose loyalty to the Government he suspects. There is no reason in the Constitution why the President should not limit the training staff to persons whose loyalty is beyond the faintest shadow of suspicion."

[12] Even in the case of a civilian Government employee who sought the position he holds, rather than being drafted, although we said that "mere dismissal" is not punishment and that there is no redress for injury suffered "in the process of dismissal," we recognized no authority to inflict gratuitous injury over and above the dismissal. *Bailey* v. *Richardson*, *supra* note 10, 86 U.S.App.D.C. at 257-58, 265, 182 F.2d at 55-56, 63.

of law: whether appellee may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than "excellent," even assuming the correctness of all of the information appellee relies upon. That claim being "wholly dependent upon a question of law," it is within the jurisdiction of the District Court. *United States* v. *Williams*, 278 U.S. 255, 257-58 (1929); NOTE, 70 HARV. L. REV. 533, 539-40 (1957). Nothing in *Gentila* v. *Pace*, *supra*, is to the contrary. Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge. As was pointed out in *Schustack* v. *Herren*, 234 F.2d 134, 135 n. 1 (2d Cir. 1956), "The Supreme Court has not yet spoken on the question of whether and to what extent the courts have power to review or control the War Department's action in fixing the type of discharge certificates isued to soldiers [footnote omitted] . . . .' Patterson v. Lamb, 329 U.S. 539, 542, 67 S.Ct. 448, 449, 91 L.Ed. 485." In the footnote, the Supreme Court referred, among other authorities, to the decision of this court in *Denby* v. *Berry*, 51 App.D.C. 335, 279 Fed. 317 (1922), *reversed on other grounds*, 263 U.S. 29 (1923). In that case we held "void and without authority of law" what we thought to be a discharge which did not comport with statutory procedure.[13] See also *Davis* v. *Woodring*, 72 U.S.App.D.C. 83, 85, 111 F.2d 523, 525 (1940).

That appellant seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court of jurisdiction. If, upon review,

[13] Our decision was reversed by the Supreme Court upon the ground that what we considered a discharge was actually merely a transfer from active to inactive status, something wholly within the discretion of the commander-in-chief.

the discharge given appellant is declared to be void, we must assume that the Secretary would issue a discharge which is not void. *Denby* v. *Berry, supra.* Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it may, at least, enjoin a denial for such reasons. *Perkins* v. *Elg,* 307 U.S. 325, 349-50 (1939); *Shachtman* v. *Dulles,* 96 U.S.App.D.C. 287, 294, 225 F.2d 938, 940 (1955).

Both parties request that we decide the merits of this controversy—namely, whether the Universal Military Training and Service Act of 1948, 62 STAT. 606, 50 U.S.C. App. § 454(b),[14] pursuant to which Directive 5210.9 was promulgated, authorizes issuance of less than an "honorable discharge" certificate, in the circumstances of this case. But I think that since the District Court never reached consideration of the merits, sound judicial practice requires that it should first have that opportunity.

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[14] The statute sets the draftee's term of service at two years, "unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense . . . ."